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No. 82-662

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RASHID, ROLA & RITA KARAM, BY AND THROUGH
THEIR FATHER AND NEXT BEST FRIEND,
MAURICE R. KARAM
AND
MAURICE R. KARAM, PETITIONERS,

v.

ALLSTATE INSURANCE COMPANY,
BUCKEYE UNION INSURANCE COMPANY
AND MAURICE R. KARAM, ADMINISTRATOR
OF THE ESTATE OF ROSE KARAM.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTION PRESENTED

Whether the Ohio Supreme Court's interpretation of the Ohio Constitution, Article IV, Section 2, is a correct interpretation, and, if so, whether the Ohio Constitution operated to deny plaintiffs due process of law.

TABLE OF CONTENTS

	Page
Opinions Below- ----------	1
Jurisdiction- ----------	1
Statutory Provisions Involved- ----------	1
Statement of the Case- ----------	4
Reasons for Denying the Petition- -------	5
Certificate of Service- ----------	19
Affidavit of Mailing Process- ----------	20

CASES Page

Ashland Bank & Savings Co. v. Hausman --- 8
5 Ohio App. 165 (1915)

Bowytz v. Tax Commission of Ohio -------- 10
12 Ohio Op. 449, 32 N.E. 2d 39, aff'd
135 Ohio St. 278, 20 N.E. 2d 528 (1939)

Burchett v. Cardwell ---------- 16
493 F.2d 492 (9th Cir. 1974)

Chandler & Taylor Co. v. Southern
Pacific Co. ---------- 14
104 Ohio St. 188, 135 N.E. 620 (1922)

Demereaux v. State ---------- 9
35 Ohio App. 418, 172 N.E. 551 (1930)

Frank v. Mangum ---------- 17
237 U.S. 309 (1915)

Glidden Co. v. Zdanok ---------- 16, 17

Hupp v. Hock-Hocking Oil & Natural
Gas Co. ---------- 14
88 Ohio St. 61, 101 N.E. 1053 (1913)

Montaldo v. State ---------- 8
51 Ohio App. 6, 199 N.E. 198 (1935)

Myers v. Benjamin Rose Institute -------- 13
92 Ohio St. 238

Sas v. State of Maryland ---------- 17
334 F.2d 506 (1964)

State v. Cook ---------- 11, 16
146 Ohio St. 348, 66 N.E. 2d 207(1946)

CASES - Continued: Page

State v. Foraker---------- 13
46 Ohio St. 677, 23 N.E. 491 (1889)

Tari v. State---------- 7, 8
117 Ohio St. 481, 159 N.E. 594 (1927)

CONSTITUTION AND STATUTES:

Ohio Constitution, Article IV, Section 2
as amended 5/7/68---------- 1, 5, 8, 10, 13, 15, 16, 18

Ohio Constitution, Article IV, Section 2
as amended 11/7/44---------- 2, 11, 13, 18

MISCELLANEOUS:

73 A.L.R. 2d, 1267, Sections 12 and 14--- 7

22 O. Jur. 3d, Courts and Judges, §26---- 9

22 O. Jur 3d, Courts and Judges, §51----- 7

Black's Law Dictionary, 375 (rev.-------- 12
5th ed. 1979)

OPINIONS BELOW

The respondents accept the recitation of opinions below as set forth in the Petitioners' Brief.

JURISDICTION

The respondents accept the recitation of jurisdiction as set forth in the Petitioners' Brief.

STATUTORY PROVISIONS INVOLVED

Constitution of Ohio, Article IV, § 2, as amended 5/7/68

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the

place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

Constitution of Ohio, Article IV, § 2, amended November 7, 1944, read as follows:

§2. [The supreme court.] The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. If any of said judges shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice, or in case of the absence or disability of the chief justice, the judge having the longest period of service upon that court, may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. The judge of the court of appeals so designated shall temporarily perform the duties of a judge of the supreme court as to such cause or causes designated. A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have

original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the supreme court shall be elected by electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law. Whenever the judges of the supreme court shall be equally divided in opinion as to the merits of any case before them and are unable for that reason to agree upon a judgment, that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below. No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void. In cases of public or great general interest

> the supreme court may, within such limitations of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals. All cases pending in the supreme court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court."

STATEMENT OF THE CASE

On February 16, 1982, petitioners and respondents appeared before the Ohio Supreme Court and presented the merits of their respective cases. At that time, neither party raised an objection to the fact that Judges Stephenson and Victor were sitting for Justices Celebrezze and Brown. Four months later and after petitioners had received an adverse decision, they then raised the issue that the court was not a competent body to have decided the case due to the two visiting judges. Petitioners, in their motion for rehearing, claimed that,

at most, only one justice could be absent, or, in the alternative, the only permissible excuse for a justice's absence was disqualification. The Ohio Supreme Court held that neither argument was meritorious.

REASONS FOR DENYING THE PETITION

If the respondents correctly read the petitioners' brief, it appears that the argument being made by petitioners is not an attack on the Ohio Constitution, Article IV, Section 2, but rather a disagreement with the Ohio Supreme Court's interpretation of that provision. The petition should be denied because petitioners have waived their objection to the composition of the court by proceeding with their argument and by raising no objection until after they had received an adverse decision. The petition should also be denied because the Ohio Supreme Court's interpretation of the Ohio Constitution was correct. In addition, a quorum of five elected justices of

the Ohio Supreme Court decided the case, the majority of whom held for the respondents. Finally, the United States Supreme Court should not disturb the Ohio Supreme Court's interpretation of the Ohio Constitution.

Petitioners, when appearing before the court on February 16, 1982, were well aware that the Supreme Court was comprised of five justices and two visiting judges. Nonetheless, petitioners, with full knowledge of that fact, failed to raise any objection to the composition of the court, and proceeded to argue their case. Indeed, an objection to the composition of the court was made only after the court reached a decision adverse to petitioners. Under such circumstances, petitioners have waived their right to object to the composition of the court.

The general rule is that a complaining party who has knowledge concerning the absence of qualifications of a judge and fails to raise them before proceeding to a hearing may

not successfully raise the question on review. See 73 ALR 2d 1267, Sections 12, 14 and cases cited therein. The essence of the ALR annotation is that the objection to qualifications of the judge, or, in this case, the composition of the court, must have been raised prior to proceeding with the oral argument or hearing. As stated in 22 O. Jur. 3d, Courts and Judges, § 51:

> "Ohio is in line with the view that where there is original, constitutional or statutory authority for an election or appointment of a special, substitute or pro tem judge, and the record does not affirmatively show that the person in question could not, in any event, legally perform the functions of such a judgeship, objections to the title or authority of such a judge cannot first be made upon appeal."

Reason clearly supports this rule in that it prohibits litigants from proceeding with the hearing when they have full knowledge of an objection but fail to raise it unless an adverse decision is reached. Simply put, the petitioners cannot have their cake and eat it too. The syllabus in Tari v. State, 117 Ohio

St. 481, 159 N.E. 594 (1927), which is the law in the State of Ohio, as enunciated by the Ohio Supreme Court, reads:

> "1. Interest of a judge in the decision of a cause pending before him disqualifies him from hearing and determining the cause."
>
> "2. Such disqualification is waived unless objection be made thereto at the earliest opportunity, and if known to the complaining party at or before trial and if no objection be made in the trial court, will be deemed to be waived." See also Ashland Bank & Savings Co. v. Hausman, 5 Ohio App. 165 (1915) and Montaldo v. State, 51 Ohio App. 6, 199 N.E. 198 (1935).

Thus, even if petitioners' arguments as to the composition of the court were meritorious, any objection thereto was waived by their proceeding with the argument and raising no objections until after they had received an adverse decision.

The Ohio Constitution, Article IV, Section 2, specifically provides that the Chief Justice of the Ohio Supreme Court may appoint substitute judges from any court of appeals for any member of the Supreme Court who is

unable to act in a particular action. The Constitution provides in relevant part:

> "If any member of the court shall be unable, by reason of illness, disability, or disqualification to hear, consider and decide a cause or causes...". (Emphasis supplied). Ohio Constitution, Article IV, Section 2.

It is apparent from the above cited language that the Ohio Constitution allows for replacement of "any member" who is unable to decide the case. There is simply no limitation in the Constitution which restricts the number of substitute judges to one.

A properly appointed substitute judge in Ohio generally has the same power and responsibilities of a regular justice during the temporary period in which he is presiding in the Supreme Court. 22 O. Jur. 3d, Courts and Judges, §26. The Ohio Constitution provides the requisite authority for the delegation of this judicial power. Demereaux v. State, 35 Ohio App. 418, 420, 172 N.E. 551 (1930).

The basis of the petitioners' argument

is that the Ohio Constitution, Article IV, Section 2, is so worded as to limit a competent Ohio Supreme Court tribunal to six regular elected justices and one visiting or substitute justice. Accordingly, it is necessary to analyze Ohio case law and the historical development of the constitutional provision to illustrate that such a narrow interpretation of this provision is clearly awry. The purpose of statutory construction is to arrive at the intent of the language used. Bowytz v. Tax Commission of Ohio, 12 Ohio Op. 449, 32 N.E. 2d 39 aff'd, 135 Ohio St. 278, 20 N.E. 2d 528 (1939).

Article IV, Section 2 of the original Ohio Constitution made no reference to or provision for the substitution of justices for the Supreme Court. However, on November 7, 1944, this provision was amended to provide for the substitution of justices. The amendment to Article IV, Section 2, as adopted in 1944, which is the immediate predecessor to

the present provision, used language which could be considered to allow multiple substitutions by stating:

> "If any of said judges shall be unable (emphasis supplied)."

Subsequent to this amendment, the Ohio Supreme Court in State v. Cook, 146 Ohio St. 348, 66 N.E. 2d 207 (1946), decided a case with two substitute judges and five justices. Only through the use of the substitutions did the court have sufficient justices to render a decision. It is irrelevant to the issue that the parties agreed to the substitutions since the Ohio Constitution expressly provided for such an action. The Ohio Supreme Court in State v. Cook was competent to render a decision regardless of its composition of justices and visiting judges. The Ohio Constitution did not then and does not now require consent of the parties for substitution of the justices.

The present Ohio Constitution is consistent with its predecessor through use of the

words "if any member...". The petitioners laboriously attempt, through the use of occult analysis of the phrase "if any member", to demonstrate that the substitution for justices made the tribunal incompetent and that they could now challenge the tribunal's competency on appeal rather than objecting by motion before a decision was rendered. Petitioners attempt to show that the substitute justices were not de facto judges. We would agree that the appellation "de facto judge" is not properly applied to the two substitute justices. According to Black's Law Dictionary, 375 (rev. 5th ed. 1979) a de facto judge is:

> "[a] judge who functions under color of authority but whose authority is defective in some procedural form."

The judges in the instant case were properly appointed under the Ohio Constitution and, therefore, were not judges de facto.

The petitioners' argument clearly conflicts with the apparent meaning of the constitutional provision at issue and Ohio case law

suggests that such construction be rejected. State v. Foraker, 46 Ohio St. 677, 23 N.E. 491 (1899). The wording of the predecessor amendment to Article IV, Section 2 of the Ohio Constitution and the language of the present provision are so similar that it was clearly the intent of the drafters of the Ohio Constitution that they should be interpreted the same. The drafters did not, as the petitioners would have us believe, mean "any one member". Instead, as stated in Myers v. Benjamin Rose Institute, 92 Ohio St. 238, 110 N.E. 928 (1915):

> "Uniformity, certainty and stability in the law are salutory results always to be sought, and when the highest court of the state has given a construction to a constitutional provision, which has been accepted and acted on by the legislature throughout a long period, it should not lightly be set aside." p. 249

Ohio Courts have been of the view that, in construing constitutional provisions, narrow and technical definitions of particular

words and phrases should be disregarded. Hupp v. Hock-Hocking Oil & Natural Gas Co., 88 Ohio St. 61, 101 N.E. 1053 (1913); Chandler & Taylor Co. v. Southern Pacific Co., 104 Ohio St. 188, 135 N.E. 620 (1922)

The Ohio Supreme Court has previously interpreted the constitutional provision at issue in this case. A change in that interpretation, such as requested by petitioners, would radically limit the intention of the Ohio Constitution concerning absence of justices in the Ohio Supreme Court. Such a revolutionary change would clearly slow the wheels of justice whenever, and for whatever reason, two justices are absent. Under the petitioners' argument, if two Supreme Court justices had to disqualify themselves for reason of bias or interest, the case could never constitutionally be decided as only one member of the Supreme Court could be replaced. The impracticability of petitioners' construction is especially poignant in light of the presence of

adequately elected Court of Appeals justices who could substitute for absent supreme court justices. The obvious lack of Ohio case law on point to support the petitioners' argument further emphasizes the error in their rationale.

It is noteworthy that Article IV, Section 2 of the Ohio Constitution also provides that a majority of the Supreme Court is necessary to constitute a quorum and render a competent judgment. In this case, five of seven justices present during the oral argument were regularly elected justice of the Supreme Court, and a majority of those justices ruled against the petitioners. Clearly under the Ohio Constitution, a competent Supreme Court has decided the case and assuming, arguendo, that it was error to appoint two visiting judges, such error is harmless.

The petitioners' additional contention that the assignment of two judges violated their clients' rights to due process is also

in error. This argument is premised upon petitioners' narrow interpretation of the Ohio Constitution, Article IV, Section 2. The Ohio Constitution is the sole source of authority for judicial tribunals and it allows for the substitution of justices elected to the Ohio Supreme Court by judges from the state's courts of appeals. As stated in State v. Cook, supra, a tribunal of five justices and two substitute judges was considered a competent tribunal to decide the case and non-violative of the parties' due process rights. This view has been followed in several other jurisdictions, including Burchett v. Cardwell, 493 F.2d 492 (9th Cir. 1974) in which only three of the five justices of the State Supreme Court heard oral arguments. This was held not to have denied the defendant his rights of due process of law.

In Glidden Co. v. Zdanok, 370 U.S. 530 (1962), this Court held that a decision by a Court of Appeals in which a judge of the Court

of Claims was a substitute member of the panel is not vitiated under the due process clause by the participation of the substitute judge. The petitioners in the instant case are attempting to circumvent the rule forbidding challenges to the authority of the judge which is founded:

> "[U]pon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it, if adverse upon a technicality of which they were previously aware..." Glidden, 370 U.S. at 535

The tribunal of the Ohio Supreme Court was competent in the present case and satisfied the due process requirement. Referring to Frank v. Mangum, 237 U.S. 309 (1915), the Court of Appeals in Sas v. State of Maryland, 334 F.2d 506 (1964) stated:

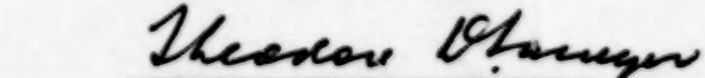
> "The Supreme Court has put it beyond the range of further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard,

> before a competent tribunal are not interfered with. (Emphasis supplied.) at p. 515

The Ohio Constitution, as amended in 1968, its predecessor, as amended in 1944, and Ohio case law all support the conclusion that a court which includes two substitute judges is a competent body and satisfies the requirements of due process of law.

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify, as a member of the Bar of this Court, that a true copy of the Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the United States was sent by regular U. S. mail, postage prepaid, to Walter J. Wolske, Jr., 580 South High Street, Suite 320, Columbus, Ohio 43215, attorney for petitioners, this 12th day of November, 1982.

Theodore D. Sawyer

THEODORE D. SAWYER

AFFIDAVIT OF MAILING PROCESS

STATE OF OHIO

COUNTY OF FRANKLIN, SS:

I, Theodore D. Sawyer, after first being duly sworn, deposes and states that to my knowledge, the Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Ohio was delivered by Airbourne Express and properly addressed to the Clerk of this Court on November 12, 1982 and that, therefore, this document should be deemed timely filed pursuant to Rule 28.2 of the United States Supreme Court Rules.

Theodore D. Sawyer

THEODORE D. SAWYER

SWORN TO BEFORE ME and subscribed in my presence this 12th day of November, 1982.

Julia S. Settimo

Notary Public

JULIA S. SETTIMO
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION EXPIRES AUG. 18, 1986